BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CHARLES R. DINNEEN	)	
Claimant	)	
v.	)	
	)	Docket No. 1,073,970
GRIFFITH STEEL ERECTION, INC.	)	
Respondent	)	
and	)	
	)	
AMERICAN INTERSTATE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the September 1, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller. Claimant appears by counsel, Kenton D. Wirth. Respondent appears by counsel, Terry J. Torline.

ISSUES

The ALJ found claimant did not violate safety regulation fall protection requirements by failing to secure his harness. The ALJ also found claimant was impaired by amphetamines at the time of his accident and denied claimant's requests for medical treatment, temporary total disability (TTD), outstanding medical bills, medical mileage and reimbursement of out-of-pocket medical expenses.

Claimant contends the Board has jurisdiction to review the issues concerning compensability of the claim. Claimant argues a report from Dr. John McMaster should not have been admitted into evidence because it was based on preliminary drug screen results without satisfying the foundation requirements of K.S.A. 2014 Supp. 44-501(b)(3). Claimant contends respondent did not prove claimant's accident was contributed to by the use or consumption of alcohol or drugs.

Respondent argues the Board lacks jurisdiction to review whether the ALJ erred by admitting Dr. McMaster's report and opinions into evidence. Respondent contends It proved claimant's accident was contributed to by his use of amphetamines. Respondent argues regardless of the drug defense, claimant willfully failed to use reasonable protection to prevent the injury. Respondent requests the Board affirm the ALJ's order or dismiss claimant's appeal for lack of jurisdiction.

The issues are:

1. Does the Board have jurisdiction to review the admission of Dr. John F. McMaster's report?

2. Did respondent prove claimant's accident was contributed to by the use or consumption of drugs?

3. Did claimant willfully fail to use a guard or protection against accident required by statute or provided by respondent, or recklessly violate respondent's workplace safety rules?

FINDINGS OF FACT

Claimant began working for respondent in May 2012, as a journeyman ironworker. On April 28, 2015, at 7:00 a.m. the foreman, Clayton (claimant did not remember his last name), told claimant his job for the day was setting the perimeter angle on top of the steel. The perimeter angle is a three-inch by three-inch angle that comes in twenty foot-long sticks. The perimeter angle was attached around the exterior of the building for the decking or roofing to bear on between the gaps of the steel. A spud wrench is used to install the perimeter angle. The spud wrench is a foot-and-a-half long pointed tool, carried in the tool belt.

Claimant used a scissors lift to move to the work area 18 to 20 feet from the ground. Claimant testified the scissors lift has a railing. There was no covering on the roof, only the steel beams and joists.

At approximately 9:00 a.m., claimant walked over to get into the scissors lift to descend to the ground to get more material. Clayton was already in the scissors lift. As claimant stepped into the scissors lift, his spud wrench lodged between the structural steel and the block wall, jerking him back, and causing him to miss the scissors lift and fall. The distance between the beam claimant was stepping off and the scissors lift was approximately two feet.

Claimant fell into the opening between the scissors lift and the truss he was standing on, falling approximately 18 to 20 feet onto a concrete slab. Claimant remembers getting pulled back by the spud wrench and Clayton trying to grab his hands. Claimant remembers falling, but does not remember hitting the concrete.

Claimant testified that he had his work harness on when he fell, but was not using a safety line. Claimant's harness has leg and shoulder straps, holds his tool belt and is part of his fall protection. The harness has D-rings that can be hooked to a safety line. A safety line was available that day, but claimant did not use it because he did not believe he needed it. Claimant testified iron workers follow a category of OSHA regulations called Subpart R, which gives iron workers the choice to be "tied off" or connected by a lanyard from 15 to 30 feet and requires them to be connected from 30 feet or more. Claimant read

parts of Subpart R and reviews the rules quite often because of frequent problems with contractors about being tied off over certain heights.

An employer can modify or make his own rules more stringent than the OSHA regulations, but they cannot lessen the rules. According to claimant, respondent required workers to be tied off at 30 feet and above. The morning of the accident there were two workers on the steel and two other workers in a scissors lift hanging steel and none were tied off. Claimant testified his supervisor did not accuse him of breaking a company safety rule or an OSHA rule. Claimant was not aware if he violated a company safety direction or instruction by his supervisor. Workers on a scissors lift are not required to be tied off because the lift has a three-foot railing.

About 15 minutes after his fall, claimant was taken by ambulance to St. Catherine Hospital in Garden City. At St. Catherine's emergency room, claimant was heavily medicated and x-rayed. He was not asked to complete any paperwork. Claimant did not remember a lot due to the heavy medications or know how long he was at St. Catherine's. He was transferred to Wesley Hospital in Wichita by ambulance and was not conscious during the trip. The next thing claimant remembers was coming out of surgery at Wesley.

At Wesley, claimant was treated by Ryan Ficco, M.D., who performed two surgeries. Dr. Ficco trimmed the leg bones, filled them with antibiotics, and placed an external fixator to hold them in place. They set claimant's wrist and put in a steel rod, and filled his other wrist with antibiotics to help the swelling before they could work on it further. Claimant was released from the hospital on May 4.

The day he was released from the hospital, a case worker employed by Wesley told claimant he failed a drug screen because he tested positive for opiates and amphetamines. Claimant testified he was not taking any medications at the time of the accident, or a week before the accident. Nor did he use opiates or amphetamines immediately prior to his accident on April 28, 2015.

Claimant joined the Iron Workers Structural Ornamental and Bridge Union Local 24-A out of Denver, Colorado, in 2012. Claimant is subject to random drug tests through the union and had just taken one around one month before the accident.

Claimant acknowledged signing, at respondent's request, a document stating he received and/or reviewed a copy of the DISA Consortium Substance Abuse Policy on October 23, 2014.[1] Claimant believed the union drug screen was separate from the DISA policy. Claimant did not recall reviewing the DISA policy or know the policy required drug testing for any employee involved in a work-related accident.

[1] Claimant's Depo. Ex. 2

At claimant's evidentiary deposition, respondent introduced Deposition Exhibit 3, a document dated April 29, 2015, That document contains a laboratory report with urine drug screen results for claimant. The document does not list the name of the laboratory, but is presumably from Wesley because it also mentions an abdomen ultrasound and a diagnostic radiology report. The document indicated claimant had opiates greater than 300 ng/ml and amphetamines greater than 1000 ng/ml. Claimant objected to the exhibit because the exhibit did not meet the parameters required by K.S.A. 2014 Supp. 44-501(b).

At the preliminary hearing, respondent moved to introduce Respondent's Exhibit 1, a report from Dr. McMaster dated August 28, 2015. Claimant objected because Dr. McMaster's report referred to claimant's drug screen test results. Dr. McMaster indicated claimant tested positive for amphetamines in excess of 1000 ng/ml. The doctor stated the most reasonable explanation for the positive test was that claimant misused or abused amphetamines or methamphetamines. Dr. McMaster opined that "within a reasonable degree of medical certainty, that use/abuse of amphetamines represent a significant contributory factor leading to this individual's impairment in capacity, competence and judgment with respect to performing dangerous activities at heights above ground level."[2]

Claimant argued to the ALJ that Dr. McMaster's report did not meet foundation requirements of K.S.A. 2014 Supp. 44-501(b). Claimant did not object to Respondent's Exhibit 2, a document from Wesley ordering several tests including a urine drug abuse screen. Claimant objected to Respondent's Exhibit 5, an email from OSHA stating that employees above 10 feet must use personal fall arrest systems or guardrail systems and Exhibit 6, another email from OSHA indicating scaffolds need guardrails, but if the guardrail is inadequate or the worker leaves the platform, an additional fall protection device would be required. Both of the OSHA emails were in response to queries for information made in 2005 and 1998. The ALJ overruled Claimant's objections.

The preliminary hearing Order did not rule on claimant's objection to Deposition Exhibit 3, claimant's drug test results. The preliminary hearing Order discusses the urine drug screen results and indicates it was undertaken exclusively to protect claimant's health and welfare.

PRINCIPLES OF LAW AND ANALYSIS

The Board does not have jurisdiction to review the admissibility of Dr. McMaster's report.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an ALJ

[2] P.H. Trans., Resp. Ex. 1 at 3.

exceeded his or her jurisdiction.[3] This includes review of the preliminary hearing issues listed in K.S.A. 2014 Supp. 44-534a(a)(2) as jurisdictional issues, which are: (1) whether the worker sustained an injury by accident or by repetitive trauma, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.[4]

The Board does not have jurisdiction to review the ALJ's ruling that Dr. McMaster's report was admissible. This Board Member finds that, under the circumstances of this claim, the Board is without jurisdiction to review the evidentiary ruling made by the ALJ on appeal from the ALJ's preliminary hearing Order. It is well within an ALJ's authority to rule on evidentiary issues. Moreover, it is incumbent on an ALJ to rule on the admissibility of evidence, including medical reports that discuss drug testing results. In *Lodwick,*[5] a Board Member stated:

> The issue whether drug testing results should be admitted into evidence at a preliminary hearing is not a jurisdictional issue listed in K.S.A. 44-534a that is subject to review in an appeal of a preliminary hearing order. Moreover, there is no question an administrative law judge has the authority to make evidentiary rulings at a preliminary hearing.

The Board has followed the maxim set forth in *Lodwick* in other cases[6]. Moreover, the Board has ruled that it has no jurisdiction to review an ALJ's ruling that a medical report is or is not admissible at a preliminary hearing.[7]

Respondent failed to prove claimant was impaired at the time of his accident because of using illegal drugs.

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[3] K.S.A. 44-551(b)(2)(A)(Furse 2000).

[4] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[5] *Lodwick v. Webster Engineering & Manufacturing Company, Inc.*, No. 1,030,167, 2007 WL 435901, (Kan. WCAB Jan. 18, 2007).

[6] See *Hutchinson v. U.S.D. 259,* Nos. 1,033,518 & 1,033,519, 2011 WL 769931 (Kan. WCAB Feb 12, 2010); *Hicks v. Butler Transport, Inc.*, No. 1,026,648, 2006 WL 2328107 (Kan. WCAB Jul. 14, 2006); *Garcia v. ADM Farmland,* No. 1,007,078, 2003 WL 21962903, (Kan. WCAB Jul. 10, 2003); *Holloway v. Sterling Drilling Co.,* No. 1,063,474, 2013 WL 5521847 (Kan. WCAB Sept. 19, 2013).

[7] See *Vega v. Panera Bread,* No. 1,037,866, 2008 WL 3280321 (Kan. WCAB July 18, 2008); *Wheeler v. HBD Industries, Inc.,* No.1,054,924, 2011 WL 5341323 (Kan WCAB Oct. 27, 2011); *Ledford v. The Eye Doctors,* Nos. 1,052,974 & 1,052,975, 2012 WL 1142965 (Kan. WCAB Mar. 8, 2012).

The Board has jurisdiction to determine if claimant was impaired at the time of his accident because of using illegal drugs. If claimant was so impaired, respondent is not liable to pay claimant compensation. Respondent's allegation that claimant was impaired by using illegal drugs is a "certain defense," which the Board has jurisdiction to consider under K.S.A. 2014 Supp. 44-534a.

K.S.A. 2014 Supp. 44-501(b) provides:

> (1) (A) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including, but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens.
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> (B) In the case of drugs or medications which are available to the public without a prescription from a health care provider and prescription drugs or medications, compensation shall not be denied if the employee can show that such drugs or medications were being taken or used in therapeutic doses and there have been no prior incidences of the employee's impairment on the job as the result of the use of such drugs or medications within the previous 24 months.
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> (C) It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that, at the time of the injury, the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:

	Confirmatory test cutoff levels (ng/ml)
Marijuana metabolite[1]	15
Cocaine metabolite[2]	150
Opiates:	
Morphine	2000
Codeine	2000
6-Acetylmorphine[4]	10 ng/ml
Phencyclidine	25
Amphetamines:	
Amphetamine	500
Methamphetamine[3]	500

[1] Delta-9-tetrahydrocannabinol-9-carboxylic acid.

[2] Benzoylecgonine.

[3] Specimen must also contain amphetamine at a concentration greater than or equal to 200 ng/ml.

[4] Test for 6-AM when morphine concentration exceeds 2,000 ng/ml.

(D) If it is shown that the employee was impaired pursuant to subsection (b)(1)(C) at the time of the injury, there shall be a rebuttable presumption that the accident, injury, disability or death was contributed to by such impairment. The employee may overcome the presumption of contribution by clear and convincing evidence.

(E) An employee's refusal to submit to a chemical test at the request of the employer shall result in the forfeiture of benefits under the workers compensation act if the employer had sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes post-injury testing.

(2) The results of a chemical test shall be admissible evidence to prove impairment if the employer establishes that the testing was done under any of the following circumstances:

(A) As a result of an employer mandated drug testing policy, in place in writing prior to the date of accident or injury, requiring any worker to submit to testing for drugs or alcohol;

(B) during an autopsy or in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and not at the direction of the employer;

(C) the worker, prior to the date and time of the accident or injury, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident or injury;

(D) the worker voluntarily agrees to submit to a chemical test for drugs or alcohol following any accident or injury; or

(E) as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post-injury testing program and such required program was properly implemented at the time of testing.

(3) Notwithstanding subsection (b)(2), the results of a chemical test performed on a sample collected by an employer shall not be admissible evidence to prove impairment unless the following conditions are met:

(A) The test sample was collected within a reasonable time following the accident or injury;

(B) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;

(C) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health

> and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;
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> (D) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample;
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> (E) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee; and
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> (F) a split sample sufficient for testing shall be retained and made available to the employee within 48 hours of a positive test.

K.S.A. 2014 Supp. 44-501(b)(3) provides that in order for drug test to be admissible, the test sample must be collected within a reasonable time following the accident or injury, must be performed under the supervision of a licensed health care professional, the sample must be tested by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, the test must be confirmed by a gas chromatography-mass spectroscopy or other comparably reliable analytical method and a split sample must be kept and made available to the employee within 48 hours.

The burden of proof is on respondent to prove claimant's injury was contributed to because he consumed illegal drugs. This Board Member finds unpersuasive Dr. McMaster's conclusions and opinions concerning claimant's drug test results and that claimant's alleged drug usage contributed to his accident and injury. Apparently Dr. McMaster relied on records from Wesley and the laboratory drug test results introduced at claimant's deposition. The aforementioned laboratory report indicates claimant tested positive for opiates and amphetamines, but provides little other information regarding claimant's drug test.

From the record, including Dr. McMaster's report, it is not known (1) who obtained claimant's urine sample, (2) if the drug sample was obtained in the normal course of treatment for the health and welfare of claimant, (3) if claimant's sample was tested by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, (4) if the test results were confirmed by a gas chromatography-mass spectroscopy or other comparably reliable analytical method or (5) if a split sample was saved. At this juncture of the proceedings, there is insufficient evidence claimant was impaired by illegal drugs.

Claimant did not willfully fail to use a guard or protection against accident, required by stature or provided by respondent, nor did claimant recklessly violate respondent's workplace safety rules.

K.S.A. 2014 Supp. 44-501(a) states:

> (1) Compensation for an injury shall be disallowed if such injury to the employee results from:
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> (A) The employee's deliberate intention to cause such injury;
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> (B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;
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> (C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;
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> (D) the employee's reckless violation of their employer's workplace safety rules or regulations; or
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> (E) the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise.
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> (2) Subparagraphs (B) and (C) of paragraph (1) of subsection (a) shall not apply when it was reasonable under the totality of the circumstances to not use such equipment, or if the employer approved the work engaged in at the time of an accident or injury to be performed without such equipment.

Respondent introduced two emails from OSHA and argued there is an OSHA regulation that if a worker steps off a scissors lift, he or she is required to use a personal fall arrest system. The emails from OSHA have little probative value because they were responses to 2005 and 1998 queries.

Claimant testified OSHA regulations required he wear a safety line only if he worked at a height greater than 30 feet. If he worked at a height between 15-30 feet, a safety tether was optional. His testimony is uncontroverted that he was not required by respondent to use a safety line when working between 15 and 30 feet. Claimant testified the scissors lift had a guardrail. Nor did respondent's supervisor reprimand him for violating safety rules. Simply put, claimant did not willfully fail to use a guard or protection against accident required by statute or provided by respondent or recklessly violate respondent's workplace safety rules.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[8] K.S.A. 44-534a(2).

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that:

1. The Board does not have jurisdiction to review the admissibility of Dr. McMaster's report and, therefore, dismisses claimant's appeal of that issue.

2. The ALJ's finding there was insufficient evidence to prove claimant did not recklessly violated respondent's workplace safety rules by failing to secure his harness is affirmed.

3. The Board reverses the finding that claimant's alleged use of illegal drugs was a contributing factor in his accident.

4. This matter is remanded to the ALJ with instructions to address claimant's request for medical treatment, medical mileage and temporary total disability benefits.

IT IS SO ORDERED.

Dated this _____ day of December, 2015.

_____
HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Pamela J. Fuller, Administrative Law Judge